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No. 95-891

In The
Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

vs.

ROBERT D. ROBINETTE,

Respondent.

ON WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT.

MOTION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF NEITHER PARTY.

(List of Counsel on Inside Front Cover)

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MOTION OF AMICUS CURIAE TO FILE BRIEF AND BRIEF.

This motion and brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted

by Counsel for the Petitioner. Consent to file has not been received from Counsel for the Respondent, and *amicus* has been informed by Counsel's office that consent will not be granted. The letter of Petitioner has been filed with the Clerk of this Court, as required by the Rules.

Americans for Effective Law Enforcement, Inc., moves this Court for leave to file the attached brief as *amicus curiae*, and declares as follows:

1. *Identity and Interest of Amicus Curiae*. The *amicus curiae* is described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), is a national not-for-profit educational organization that conducts legal research and provides law bulletins and continuing legal education programs for law enforcement administrators and their counsel.

AELE has appeared before this Court as *amicus curiae* more than one hundred times and many times in other federal and state appellate courts. Its *amicus* program seeks to establish a body of law that enhances the effectiveness of law enforcement agencies, in a constitutional manner. AELE typically appears in support of a government agency or official. However, when the facts so warrant, AELE will decline to appear in a case or will support the opposition (as it did in *Hudson v. McMillian*, 112 S. Ct. 995 (1992)), or will choose to file its brief in support of neither party, as in the instant case.

2. *Desirability of an Amicus Curiae Brief. Amicus* is a professional association representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of administering policies and procedures involving the conduct of

traffic stops and consent searches of motorists and others; and (2) police legal advisors who are called upon to advise law enforcement officers and administrators in connection with such matters.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel at the state and national level—we are particularly aware of the impact of the ruling of the court below. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE is a national association, and its perspective is broad. This brief concentrates on policy issues, including the importance of effective rules and procedures for conducting traffic stops and consent searches in the field. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues as these.

4. *Avoidance of Duplication.* Counsel for *amicus curiae* has reviewed the facts of this case and has conferred with Counsel for Petitioner and has sought to confer with Counsel for the Respondent in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues directly related to law enforcement concerns that are not otherwise raised by either party.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the Clerk of this Court. This motion is necessary because the Respondent has not granted consent to *amicus*.

For these reasons, the *amicus curiae* requests that it be granted leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

See Section on Identity and Interest of *Amicus Curiae*, *supra.*

ARGUMENT

THE CONSTITUTIONAL VALIDITY OF A CONSENT SEARCH AFTER A VALID TRAFFIC STOP HAS BEEN CONCLUDED, SHOULD DEPEND UPON AN ANALYSIS OF THE TOTALITY OF THE CIRCUMSTANCES, RATHER THAN A PARTICULAR MECHANICAL VERBAL FORMULA USED BY THE POLICE.

The court below, *State v. Robinette*, 653 N.E.2d 695 (Ohio 1995), ruled that the right guaranteed by the federal and state (Ohio) constitutions, to be secure in one's person and property, requires that citizens stopped for traffic offenses be clearly informed by the detaining officer as to when they are free to go after a valid detention, before an officer attempts to engage in

a consensual interrogation looking to a consent search. In order to put the citizen on notice that the valid detention has ended and a period of consensual encounter has begun, the court said that an attempt at a consensual interrogation looking towards a consent to search must be preceded by the statement of the officer to the citizen, "At this time you legally are free to go," or by words to that effect.

By its own assertion, the court adopted this so-called "bright-line" rule in order to protect the voluntariness of any statement made by the citizen in this part of what it called a "seamless" transition from the end of the detention stage (reasonable suspicion) to the stage of a consensual encounter (lack of reasonable suspicion). Additionally, and as actually at issue by the facts of this case, the mechanical formula would assertedly protect the voluntariness of a consent to search that might take place in the consensual phase of the overall encounter. Because the officer in this case did not mark the point of ending of the first phase and the point of beginning of the second phase with this ritualistic warning, or words to the same effect, the defendant's consent was considered by the court to be involuntary.

The state of Ohio appears to be unique among the state and federal jurisdictions in constructing this new "bright-line" litmus test of voluntariness for consent searches, as pointed out by the dissenting opinion of Justice Sweeney. Such a rule was recently declined by the Sixth Circuit Court of Appeals in *United States v. Erwin*, 71 F.3d 218 (6th Cir. 1995). More importantly, no support in established principles of constitutional law articulated by the United States Supreme Court can be found for such a mechanical formulation, which can only be described as a prophylactic rule similar to that adopted by the Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), to protect the Fifth Amendment privilege against self-incrimination.

Americans for Effective Law Enforcement has always taken

the position—going back to our *amicus curiae* brief filed in *Terry v. Ohio*, 392 U.S. 1 (1968)—that a detention for investigative purposes must be supported by the constitutional minimum of reasonable suspicion. We said in our *amicus* brief in *Terry*, pp. 8-9, in referring to police detention practices or techniques not based upon particularized suspicion,

> All of those techniques, stated abstractly, may be, and probably are, violative of the Fourth Amendment. We would not ask this Court to approve them, efficacious as they may be as crime prevention measures. The point we make is that they can be distinguished, and must be distinguished, from the practice of stopping *particular* persons, found in *particular* circumstances which indicate past, occurring, or potential criminal conduct, for the purpose of questioning—in some cases, followed, or even preceded, by the protective device of frisk or search for weapons.

We have likewise condemned in an *amicus* brief filed in *Florida v. Bostick*, 501 U.S. 429 (1991), oppressive techniques of dragnet-style searches not based upon reasonable suspicion or probable cause (detaining all passengers on a bus without reasonable suspicion and requiring their "consent" to a search of their luggage). We said in *Bostick* that such tactics are abhorrent and comply with neither constitutional requirements nor accepted police norms of professional conduct.

Amicus supports the position of this Court in *United States v. Mendenhall*, 446 U.S. 544 (1980), as to what constitutes a Fourth Amendment seizure (restraint of liberty such that a reasonable person would not feel free to walk away: *Mendenhall*, 446 U.S. at 553-554). We likewise support the position of this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), as to what constitutes a valid consent to search (the totality of the circumstances with reference to a large list of relevant factors, including elements of police pressure and even

whether the subject has been warned of his right to refuse consent: *Schneckloth*, 412 U.S. at 227). In the subsequent case of *Florida v. Jimeno*, 500 U.S. 248 (1991), this Court applied the *Schneckloth* test to a consent search following a traffic stop, as in the instant case. And we also agree wholeheartedly with the Court's ruling in *Delaware v. Prouse*, 440 U.S. 648 (1979), that officers may not conduct traffic stops and detentions of individual motorists without articulable, reasonable suspicion.

What is particularly noteworthy to *amicus* is that in establishing the test for voluntariness of consent searches in *Schneckloth*, this Court had an opportunity to adopt a prophylactic rule similar to that in *Miranda* requiring that the police must first warn a subject of his right to refuse consent. The Court, however, did not do so. It wisely took the position that although such a warning would be *relevant* to a finding of voluntariness under the totality of the circumstances, it was not constitutionally *required*.

Such a warning may be good police practice, and indeed *amicus* knows that many law enforcement agencies among our constituents have routinely incorporated a warning into their Fourth Amendment consent forms that they use in the field, but it is precisely that—a *practice* and *not a constitutional imperative*. An officer who includes such a warning in his request for consent undoubtedly presents a stronger case for a finding of voluntariness in a suppression hearing, and we would not suggest that such agencies and officers do otherwise. We know, too, that instructors in many police training programs of leading universities and management institutes routinely recommend such warnings as a sound practice, likely to bolster the voluntariness of a consent to search. AELE itself conducts law enforcement training programs at the national level and many of our own speakers have made this very point.

This is not, however, what the court below has done. It has elevated a police practice to the position of a federal and state

constitutional right. It opens the door to a new era of endless litigation at the suppression hearing, trial court, appellate court and state and federal collateral review court levels, over the existence, adequacy, meaning, effectiveness and sufficiency of a ritualistic warning requirement that in light of *Schneckloth* and *Jimeno* can only be considered a prophylactic rule, not a constitutional imperative. We respectfully urge this Court not to launch a new *Miranda*-like era of fruitless litigation in Fourth Amendment jurisprudence similar to that which presently exists in the jurisprudence of police interrogation of suspects.

Amicus takes no position on the facts of the case before this Court. It reasserts its long-standing position against non-normative, oppressive police practices dealt with in *Terry v. Ohio* (detentions for investigation not based upon reasonable suspicion) and *Florida v. Bostick* (dragnet-like detentions and searches not based upon reasonable suspicion or probable cause). We believe that the voluntariness test for consent searches articulated by this Court in *Schneckloth v. Bustamonte*, and reaffirmed in traffic stop cases by *Florida v. Jimeno*, is constitutionally sound and thoroughly workable from a practical standpoint. Trial and appellate courts have for over twenty years been able to effectively apply the test devised by this Court in *Schneckloth* for determining the voluntariness of consent searches.

While we would encourage the police to consider the adoption of a warning of Fourth Amendment rights in the consent search context (without endorsing the mechanical formulation used by the court below) as a matter of practice, we respectfully request this Court to treat this as what it is—a *practice*—and *not a constitutional imperative*. As this Court wisely noted in the majority opinion of Justice O'Connor in *Davis v. United States*, 114 S. Ct. 2350 (1994), there is a *critical difference* between a sound *police practice* and a *constitutional imperative*. The Court took the position in that case that police clarification of suspects' ambiguous references

to counsel after an effective *Miranda* waiver might be a good police practice, but was not constitutionally required. *Amicus* respectfully submits that the same is true with respect to the police practice of warning of Fourth Amendment rights in the context of a consent to search.

CONCLUSION

Amicus urges this Court to reverse the decision of the court below insofar as it requires a formalistic warning, on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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